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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

ARTHUR YOUNG & COMPANY,

*Petitioner,*

—v.—

ROGER L. SUMMER,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. WHERE A FEDERAL SECURITIES FRAUD CLAIM IS TIME-BARRED ON THE FACE OF THE COMPLAINT, MAY A PARTY INVOKE THE FEDERAL EQUITABLE TOLLING RULE TO PREVENT THE STATUTE OF LIMITATIONS FROM RUNNING DURING THE PERIOD OF TIME WHEN THE COMPLAINT ALLEGATIONS SHOW THAT PLAINTIFF KNEW HE HAD BEEN INJURED?

2. WHERE THE ALLEGED FRAUDULENT CONCEALMENT TOLLING THE STATUTE OF LIMITATIONS IN A FEDERAL SECURITIES FRAUD CLAIM ARISES OUT OF THE REPEATED FAILURE TO MAKE ANY OF THE ANNUAL PUBLIC FILINGS AND DISTRIBUTION OF STOCKHOLDER REPORTS MANDATED BY THE FEDERAL SECURITIES LAWS, DOES THE DISCLOSURE PHILOSOPHY OF THE FEDERAL SECURITIES LAWS PREVENT A PARTY FROM INVOKING THE FEDERAL EQUITABLE TOLLING RULE?

3. WHERE THE CONGRESSIONALLY CREATED TOLLING RULES OF THE FEDERAL SECURITIES LAWS WOULD NOT SAVE AN EXPRESS CIVIL LIABILITY CLAIM, MAY A COURT APPLY THE JUDICIALLY CREATED TOLLING RULE TO SAVE AN IMPLIED CIVIL LIABILITY CLAIM?

## LIST OF PARTIES

The petitioner and defendant below is Arthur Young & Company, a general partnership of certified public accountants with offices throughout the United States which provides accounting, auditing, tax, and management advisory services to its clients. The respondent, plaintiff below, is Roger L. Summer, an individual. Other defendants below are Land & Leisure, Inc.; Guy Bailey, Sr.; Guy Bailey, Jr.; Jerome Grossman; Areca Stone Bailey; Charlotte Babcock; Raymond James Associates, Inc.; and Robert R. Fischer. Another defendant, Robert Little, died after the action was filed.

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*Petitioner,*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Arthur Young & Company ("AY") petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 664 F.2d 965 (5th Cir. 1981), is set forth in the Appendix ("A.____") at A.1a to A.11a. The opinion of the United States District Court for the Southern District of Florida is set forth in the Appendix at A.12a to A.18a.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1981. A timely petition for rehearing was denied by that court on January 29, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, provides:

> No action shall be maintained to enforce any liability created under section [11] or section [12](2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section [12](1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section [11] or section [12](1) of this title more than three years after the security was bona fide offered to the public, or under section [12](2) of this title more than three years after the sale.

## STATEMENT OF THE CASE

### I.

### THE PARTIES AND THE COMPLAINT

Roger L. Summer ("Summer") seeks recovery of the losses he sustained in connection with his purchases of the securities of Lano & Leisure, Inc. ("L & L") more than a decade ago.[1]

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1 The facts set forth herein, unless otherwise noted, are those accepted as true from Summer's complaint. Certain key allegations from the prolix complaint are repeated at A.19a to A.25a.

Allegedly in reliance on a 1971 offering prospectus of L & L filed under the Securities Act of 1933 (" '33 Act"), Summer purchased 9,500 shares of L & L in eleven separate transactions over an 18 month period.[2]

The complaint was filed in February, 1978, almost seven (7) years after Summer's first purchase and more than five (5) years after his last purchase. In addition to L & L, the issuer, Summer sued Raymond James, the underwriter, various individuals alleged to have been officers and/or directors of L & L at various times from 1971 (the "insider" defendants), and petitioner AY, who, as L & L's auditor, allegedly aided and abetted the other defendants in the sale of L & L stock in connection with the public offering.

As to AY, the complaint asserted violations of § 10(b) of the Securities Exchange Act of 1934 (" '34 Act"), 15 U.S.C.

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| *Date of Summer's Purchase* | *No. of Shares Purchased* | *Price of L & L Shares* | |
|---|---|---|---|
| | | *Low* | *High* |
| June 24, 1971 | 3,000 | 10 | 10-3/8 |
| | 600 | | (as of July 26, 1971) |
| June 20, 1971 | 400 | 10 | 10-3/8 (as of July 26, 1971) |
| August 5, 1971 | 500 | 9-3/8 | 9-6/8 |
| August 6, 1971 | 500 | 9-3/8 | 9-6/8 |
| October 2, 1972 | 500 | 2 | 2-3/8 |
| October 26, 1972 | 500 | 1-6/8 | 2-1/8 |
| November 10, 1972 | 500 | 1-4/8 | 2 |
| November 20, 1972 | 500 | 2-3/8 | 2-7/8 |
| December 20, 1972 | 500 | 1-3/8 | 1-7/8 |
| December 27, 1972 | 1,000 | 1-3/8 | 1-7/8 |
| January 3, 1973 | 1,000 | 1-2/8 | 1-3/4 |

The table is a composite of Summer's purchase amounts and dates taken from the complaint (Count I, ¶ 15) and the price of L & L on each such date as reported in STANDARD AND POOR'S OVER THE COUNTER DAILY STOCK PRICE INDEX. The District Court took judicial notice of the stock prices.

§ 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; of §§ 11, 12(2), and 17 of the '33 Act, 15 U.S.C. §§ 77k, l(2) and q; and pendent state and Blue Sky Law claims. The alleged improprieties in the complaint relate to purported misrepresentations in the 1971 offering prospectus. No other misrepresentations are alleged.

Summer alleged that L & L's true financial condition was concealed from him since June, 1971 in that L & L (1) did not file its annual and quarterly reports with the Securities & Exchange Commission ("SEC") on Forms 8-K and 10-K, (2) did not mail L & L's annual reports and proxy statements to shareholders, (3) did not call or hold any annual shareholders' meeting, and (4) did not respond to his repeated requests for information about L & L or, when L & L did respond, it offered the hollow refrain "it is in the mail." (A.23a-25a.) In other words, for over six years Summer did not get any of the materials he as a stockholder expected to receive, was required by law to be given, and repeatedly requested. These failures, which Summer alleges he was aware of, are the acts of fraudulent concealment upon which Summer relies to invoke the equitable tolling rule.

## II.

## THE DISTRICT COURT'S DISMISSAL AND THE COURT OF APPEAL'S REVERSAL

As the complaint was filed more than five years after Summer's last purchase, the District Court[3] granted AY's and the other defendants' motions to dismiss all federal claims on the grounds that they were time-barred on their face and dismissed the state law claims for lack of pendent jurisdiction. (A.12a-15a.)

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3 AY's statute of limitations dismissal motion was based on FED. R. CIV. P. 12(b)(6) and 12(g). AY asserted numerous other grounds for dismissal which, at AY's request, the District Court held in abeyance pending resolution of the limitations issue.

The Fifth Circuit affirmed the dismissal of Summer's §§ 11 and 12(2) claims under the '33 Act (A.4a-5a) concluding that they were absolutely barred even after giving effect to the Congressionally created tolling provision in § 13 of the '33 Act, 15 U.S.C. § 77m. It reversed the District Court's dismissal of the remaining claims against L & L and the "insider" defendants based upon § 10(b) of the '34 Act and § 17 of the '33 Act. (A.8a)

The Fifth Circuit affirmed the District Court's dismissal of the remaining '33 and '34 Act claims as to AY and Raymond James conceding that Summer's tolling allegations were inadequate under FED. R. CIV. P. 9(b). (A.10a). Nevertheless, because it reversed as to the other defendants, the Fifth Circuit directed Summer be given leave to replead his tolling theory with "more particularized allegations as against [AY and Raymond James] . . . if he can do so." [4] *Id.*

## REASONS FOR GRANTING THE WRIT

For more than 150 years this Court has consistently recognized and implemented the sound policies of statute of limitations. Although in limited circumstances this Court has allowed a federal equitable tolling exception to an otherwise dispositive statute of limitations defense, the decision of the Fifth Circuit squarely conflicts with the prior federal tolling decisions of this Court and of other courts of appeal, both in the manner in which it applied the exception and the conclusion drawn by the panel from the undisputed facts alleged in

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4 This was done notwithstanding the fact that Summer did not even suggest in either his briefs below or on appeal that he knew of other acts of fraudulent concealment which had not been pleaded. Nor at oral argument before the Fifth Circuit did his counsel offer other facts which justified invocation of the tolling rule. (As of the filing of this petition, plaintiff has not filed a new pleading.) In any event, AY submits that as a matter of law Summer's pleadings negate any possible fraudulent concealment and demonstrate that the statute of limitations expired.

Summer's own complaint. Further, the Fifth Circuit's decision in this case fundamentally contradicts the disclosure philosophy underlying the Securities Acts. Perhaps most important, however, is that review by this Court will give needed guidance to the lower federal courts,[5] laboring under crowded dockets and heavy caseloads, concerning the treatment of summary motions with respect to patently time-barred claims and the limited federal equitable tolling doctrine.

Finally, allowing application of the general federal equitable tolling rule to save a time-barred complaint, where the statutory tolling rule in the federal securities laws for civil liability claims expressly created by statute would bar the claim, runs counter to clearly mandated Congressional policies.

## I

## THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS

It long has been recognized that the statute of limitations is a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938). Indeed, more than 100 years ago Justice Swayne wrote:

> Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unneces-

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5 A search of decisions in LEXIS involving statute of limitations in federal securities cases since 1975 show that there are over 600 decisions. This does not begin to scratch the surface of the number of motions to dismiss on statute of limitations grounds which were denied in unreported decisions.

> sary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

*Wood v. Carpenter*, 101 U.S. 135, 139 (1879). *Accord*, *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, Kansas & Texas Railway Co. v. Harriman*, 227 U.S. 657, 672 (1913). This Court recently reaffirmed the public policies underlying statutes of limitations when it noted that they "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them'." *United States v. Kubrick*, 444 U.S. 111, 117 (1979), citing *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

In certain special circumstances limited exceptions to the general limitations principles have been permitted, such as the federal equitable tolling rule invoked here.

> [W]hen there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing. . . .

*Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349-50 (1874).[6]

Actual personal knowledge of the alleged fraud by a plaintiff is not required before a plaintiff is denied the benefit of the federal equitable tolling rule. "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he

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6 *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) extended this federal equitable tolling doctrine to cases where, because of Congress' silence, the federal cause of action borrows a state statute of limitations. *See, infra* at 14-17.

used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it." *Wood v. Carpenter*, 101 U.S. at 141. (Citations omitted.) In determining such constructive knowledge, " '[w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led'." *Id.* (Citation omitted.)

As Justice Story cautioned, invocation of the tolling doctrine must be allowed sparingly, lest the exception swallow the rule:

> It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose.

*Bell v. Morrison*, 1 Pet. 351, 360 (1828); *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895) (statutes of limitations "are not to be construed so as to defeat their obvious intent").

This court recently reaffirmed and clarified the limited role of equitable tolling when it rejected the contention that a statute of limitation is tolled until a plaintiff has actual knowledge of a legal cause of action. *United States v. Kubrick*, 444 U.S. at 122. Rather the test is simply whether a plaintiff knows he has been injured. *Id.* Moreover, as this Court made clear, this rule is not limited to medical malpractice claims, but also covers claims under other federal statutes involving complex matters, *id.* at 124,[7] such as federal securities cases.

Once a plaintiff has, or is charged with, such knowledge, the statute starts to expire because he "is no longer at the mercy of

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7 Nonetheless, some circuit courts appear confused as to the impact of *Kubrick* in non-diversity federal cases. *E.g., Premium Management, Inc. v. Walker*, 648 F.2d 778, 783 n.7 (1st Cir. 1981).

the [wrongdoer]. There are others who can tell him if he has been wronged, and he need only ask." 444 U.S. at 122. He must exercise due diligence in seeking to learn the facts which would disclose the fraud. Even if a defendant committed acts of concealment, equitable tolling ceases when the plaintiff first had reason to become suspicious or aware of the possibility of wrongdoing. This is particularly true when the plaintiff's own allegations show that he was on constructive notice of the fraud. *E.g.*, *Klein v. Bower*, 421 F.2d 338, 343-44 (2d Cir. 1970), a case involving a § 10(b) claim.

### A. Summer's Pleading Negates Any Right to Use the General Federal Equitable Tolling Rule.

In dismissing Summer's complaint, the District Court considered

- the precipitous 80% price decline within 14 months of Summer's initial purchase (A. 14a, 17a); and

Summer's own allegations concerning

- the failure of L & L to send a single one of the annual shareholder reports as required by SEC regulations;
- L & L's failure to hold a single annual shareholders' meeting; and
- L & L's failure to provide Summer with financial information he expressly demanded, and L & L's repeated statements that it was forthcoming, but in fact never came. *Id.*

The District Court concluded that the *synergistic* result of his knowledge of these accumulated facts was that Summer, as a matter of law, was on notice and failed to exercise the due diligence required by the equitable tolling rule.[8]

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8 Since the federal tolling doctrine is equitable in nature, there is room for exercise of discretion by a court on the issue of a plaintiff's discovery and diligence in § 10(b) cases when the pleadings show that

*(footnote continued on next page)*

Although the Fifth Circuit acknowledged that the clock starts running for statute of limitations purposes when the plaintiff has actual *or* constructive knowledge of facts which, in the exercise of due diligence, would have led the plaintiff to discover the alleged fraud (A.5a), it treated each of the elements on which the district court relied separately and ignored the synergistic effect of the totality of these elements.

> We can conceive of several factual situations in which a price decline, under the circumstances here, would not be indicative of fraud in the least, *e.g.*, a depressed real estate market caused either by tight money or recession.[9]
>
> With respect to the failure to send annual stockholders' reports and hold annual stockholders' meetings, none of the defendants have cited any case, nor have we found one, which holds that the mere failure to send such reports or hold such meetings is sufficient to put an investor on notice of facts which in the exercise of due diligence would have led to actual knowledge of fraud.

(A.7a-8a. Footnote omitted.)

The Fifth Circuit initially erred by improperly bifurcating the price decline[10] from the other facts known to Summer and

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the action would be time-barred but for the equitable doctrine. *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 693 (10th Cir. 1981) [The case also contains a review of the evolution of the tolling exception and its equitable foundation]. Such equitable discretion has been described as the reason why summary dispositions by district courts have been affirmed by the various circuit courts. *Id.* at n. 13.

9 The Fifth Circuit's hypothesizing about a possible decline in the real estate market as the cause of the loss in L & L price (A.7a, n.2) is unsupportable. Summer's first purchase of L & L at the 80% reduced price was in October 1972, well before the real estate decline which occurred in the United States in 1974. *See, e.g., Trattner v. American Fletcher Mortgage Investors*, 74 F.R.D. 352, 355 (S.D. Ind. 1976); *Fruchthandler v. Blakely*, 73 F.R.D. 318, 321 (S.D.N.Y. 1976).

10 Such a price decline is the actual injury suffered by Summer. Awareness of injury is precisely what this Court found dispositive in *United States v. Kubrick*, 444 U.S. at 122.

concluding that neither category of information by itself was sufficient to put Summer on notice. (A.7a-8a.) Such a severance of the different factual matters admittedly known to Summer fails to recognize that the whole is greater than its parts. Taken as a whole, the facts gave rise to a duty, as a matter of law, to investigate further and discover the cause of Summer's injury. One simply may "not await [a] leisurely discovery of the full details of the alleged scheme." *Klein v. Bower*, 421 F.2d at 343.

The Fifth Circuit's approach is directly at odds with other circuit court decisions which, in affirming statute of limitation dismissals, considered a severe price decline not in isolation but in conjunction with other miscellaneous factors. *See, e.g., Gaudin v. KDI Corp.*, 576 F.2d 708, 712-13 (6th Cir. 1978); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975).[11] Indeed, considering the importance which many circuit courts have placed on the role of a security's price in the marketplace, *e.g.*, the "fraud on the market" theory of *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976), the Fifth Circuit's failure to give due weight to significant price fluctuations, such as here, in assessing a plaintiff's due diligence and failure to investigate the causes of such a decline is error.

Especially significant here is that Summer expressly alleged that the very acts of concealment employed to cover up the

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11 *Gaudin* and *Berry Petroleum* also demonstrate the Fifth Circuit's error in apparently attempting to side-step the L & L price decline by asserting that evidence of a price decline is limited to cases when there was a specific misrepresentation relating to the value of the securities. (A.7a, n.2.) The coincidental fact that the four cases cited by the Fifth Circuit happen to involve a customer and a broker-dealer, a relationship in which statements about price may be expected to occur, does not show that evidence of a price decline is restricted to such situations. *Gaudin* and *Berry Petroleum* considered a price decline without relation to specific misrepresentations concerning price. Rather they viewed a sharp price decline as one factor among others that should have caused a reasonable person to inquire. That is precisely what the District Court did here.

fraud consisted of the failure to send the annual reports, make the required public filings, etc. (A.23a-24a.) Summer's undisputed actual awareness of such affirmative acts of "concealment", as a matter of law, charged him with a duty of further inquiry and prohibits his invocation of the tolling rule.[12]

The Fifth Circuit flatly disregarded both the spirit and the direct holdings of this Court's consistent application of statute of limitations principles and the equitable tolling rule when it refused to affirm the District Court's common sense finding of Summer being on notice of a possible claim and his lack of due diligence. The Fifth Circuit's attenuated construction of the tolling doctrine resulted in a defeat of the very intent and goals of the statutes of limitation. *See Bell v. Morrison*, *supra*; *Campbell v. Haverhill*, *supra*.

## II

## THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DISCLOSURE PHILOSOPHY UNDERLYING THE SECURITIES ACTS

The decision below is particularly pernicious because of its casual treatment—indeed almost condoning—of L & L's conceded and habitual failure to file the annual 8-K and 10-K reports with the SEC or to provide the required annual report or proxy materials to shareholders. (A.8a.) In this aspect the decision is inherently flawed and is fundamentally contrary to the philosophical foundation of the Securities Acts.

The '33 and '34 Acts are firmly grounded on the theory that disclosure and publicity of relevant information about an issuer and its securities is the best way to protect the investing public. I LOSS, SECURITIES REGULATION, at 121-28 (2d ed.

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12 Here, the promises to send the reports and the repeated failures to send reports, etc., required by statute, by their very absence cried out for investigation and due diligence by Summer.

1961) ("LOSS"); II LOSS, at 784-85.[13] Disclosure was chosen by Congress as the means of investor protection because it "prevents the kind of defrauding and exploitation of inexperienced investors which depends for its success on nondisclosure, or inadequate or misleading disclosure, by securities dealers or corporate insiders." Anderson, "The Disclosure Process in Federal Securities Regulation: A Brief Review," 25 HASTINGS L. J. 311, 314 (1974), *esp.* n. 14 citing H.R. REP. NO. 85, 73d CONG., 1st SESS. 7 (1933) and H.R. REP. NO. 1383, 73d CONG., 2d SESS. 11 (1934). (Footnote omitted.)[14]

The disclosure theory is embodied in the Securities Acts in several ways relevant here. Section 13(a) of the '34 Act requires the filing of current and annual reports, on Forms 8-K and 10-K respectively, by L & L directly with the SEC. 15 U.S.C. § 78m; 17 C.F.R. §§ 240.13a-11 and 240.13a-1. Congress believed such periodic filings were the *minimum* required for the adequate protection of investors. *E.g.*, S. REP. NO. 792, 73d CONG., 2d SESS. (1934). L & L also was required to disseminate to Summer and other shareholders a separate annual report to stockholders. 17 C.F.R. § 240.14c-3. The first such annual stockholders' report was due a few months after the end of L & L's September 30, 1971 fiscal year, which occurred shortly after Summer's first purchases, and each year thereafter.

Summer's own complaint alleges, however, that *never*, over a period of some six years, were any of the public 8-K or 10-K filings made by L & L, and *never* did L & L send a single required stockholders' report. (A.23a-24a.) The Fifth Circuit

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13 The preamble to the '33 Act expressly declares its purpose is to "provide full and fair disclosure of the character of securities sold . . . and to prevent frauds in the sale thereof . . . ." SECURITIES ACT OF 1933, PUB. L. NO. 73-22 (1933).

14 This disclosure philosophy stemmed directly from Justice Louis Brandeis' firm belief that "[s]unlight is said to be the best of disinfectants". I LOSS at 123, quoting Brandeis, OTHER PEOPLE'S MONEY, (1914).

erroneously asserted that such known violations of the federal securities laws were of no moment for statute of limitations purposes. This directly conflicts with the very philosophy of the Securities Acts and greatly demeans the steps mandated by Congress to protect investors.

Contrary to the Fifth Circuit's belief, if disclosure is the means to deter investor fraud, then L & L's repeated and uniform refusals to make the mandated statutory disclosures and filings necessarily and logically leads to the conclusion that shareholder rights, which Congress sought to protect, have been infringed and that a shareholder is then on notice as a matter of law that he may have a claim. He then has a duty to determine the extent of that claim. Mere suspicion that one has been injured by wrongdoing, not certainty of fraud, is all that is required to start the statute running. *Wood v. Carpenter, supra*. Summer thus had an undeniable, clear, and immediate duty to investigate. He did not do so.

The Fifth Circuit's decision clearly conflicts with the basic theory underlying the Securities Acts and justifies a grant of *certiorari* on that ground alone.

## III

## INVOCATION OF THE JUDICIALLY CREATED TOLLING RULE IS INCONSISTENT WITH THE CONGRESSIONALLY CREATED TOLLING RULE.

The only alleged misstatements occurred in the offering prospectus filed with the SEC by L & L in June 1971. Thus, Summer had available remedies expressly granted by Congress in § 11 of the '33 Act and § 18 of the '34 Act.[15] 15 U.S.C. §§ 77k and 78r. However, any claim under those express remedy provisions is limited by specific congressionally enacted

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15 No claim was asserted by Summer under § 18 even though it was applicable to his purchases of L & L securities.

limitations periods, 15 U.S.C. §§ 77m and 78r(c), which provide that a purchaser must bring suit within one year from the date he knew or should have known of the claim or no more than three years from the date of purchase. Thus, when Congress specifically authorized a civil remedy for security law violations, it also created an absolute outside limit of three years in which suit could be brought and only allowed a limited equitable tolling period.[16]

To allow the general federal equitable tolling doctrine to repudiate the specific tolling doctrine created by statute is inconsistent with a Congressionally mandated policy. Where Congress has so clearly spoken on the issue, we believe it is inappropriate for a court to apply the general federal equitable

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16 In every situation in which civil liability is expressly provided for in the '33 and '34 Acts, an express limitation period is also provided. Section 13 of the '33 Act provides an absolute 1-year period for actions for failure to register under Section 5 of such Act, and a period of 1 year from discovery or 3 years from sale for actions by buyers for misstatements or omissions in the sale of any security. Under the '34 Act a similar 1 and 3 year period is applicable to actions based on manipulative and fraudulent actions on a national securities exchange (§ (9)(e),15 U.S.C. § 78i(e)); actions based on misleading statements and documents filed with the Securities Exchange Commission (§ 18(c), 15 U.S.C. § 78r(c)); and actions to void contracts (§ 29(b), 15 U.S.C. § 78cc(b)). The only exception to the 1 and 3 year pattern is a 2-year statute applicable to the recovery of insider profits under § 16(b) of the '34 Act. Even so, it is evident that Congress manifested a clear intent to prescribe a limited limitations period under both the '33 and '34 Acts. The intent of Congress to prescribe a short limitations period for violations of the federal securities acts is underscored by the fact that § 207 of the '34 Act reduced the limitations period set forth in § 13 of the '33 Act "(a) by striking out 'two years' wherever it appears therein and inserting in lieu thereof 'one year'; (b) by striking out 'ten years' and inserting in lieu thereof 'three years'; and (c) by inserting immediately before the period at the end thereof a comma and the following: 'or under section 12(2) more than three years after the sale.' " 73d CONG. C. 404, Title II, § 207, 48 Stat. 980. *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976), where this Court noted that in borrowing state statutes it was assumed they were generally consistent with this the one/three year structure of the securities act.

tolling doctrine, *cf. Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979),[17] and the Courts should be controlled by the express provisions of the securities acts. *Rosenberg v. Globe Aircraft Corp.*, 80 F. Supp. 123, 124 (E.D. Pa. 1948), [the venue requirements applicable to §§ 11 and 12(2) of the 1933 Act should be applied to an action under Rule 10b-5: "It cannot be supposed that Congress intended to abolish these regulations and limitations when it enacted Sec. 10 of the Act of 1934."] *Compare McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 228-29 (1958), where Justice Brennan said in concurring:

> I do not believe that the absence of specific directions from Congress leads necessarily to the result that state statutes of limitations should apply in cases of this sort. The reason is that the considerations which in *Campbell v. Haverhill*, *supra*, and *Cope v. Anderson*, *supra*, prompted resort to the state statutes do not apply at all here. Those cases represented intensely practical solutions to a practical problem in the administration of justice. *In the absence of any comparable federal statute of limitations which might be applied*, the Court had four choices: (1) No period of limitations at all; (2) an arbitrary period applicable in all like cases; (3) the flexible but uncertain doctrine of laches; and (4) state statutes of limitations. The state statutes were chosen by default.
>
> No such default is necessary in this case since the Court can look elsewhere for the measure of the seaman's federal right to recover for unseaworthiness. Just as

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17 On April 5, 1982 this Court granted certiorari in *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir.), *reh. den.*, 650 F.2d 815 (1981), to determine, *inter alia*, whether an implied civil liability may be created by the Courts when an express remedy is otherwise available. If this Court were to answer that question in the negative, Summer would have no claim here. However, even if the Court finds that an implied remedy could exist coextensively with an express remedy, the question remains whether a congressionally imposed limitation on the exercise of the express remedy can be ignored by allowing a more liberal period for the implied remedy.

equity follows the law in applying, as a rough measure of limitations, the period which would bar a similar action at law, see *Russell v. Todd*, 309 U.S. 280, 287, I think that the maritime cause of action for unseaworthiness could be measured by the analogous action at law for negligence under the Jones Act, 46 U.S.C. § 688. This reference seems especially appropriate since the seaman's remedy for unseaworthiness under the general maritime law and his remedy for negligence under the Jones Act are but two aspects of a single cause of action. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316.

## CONCLUSION

For the reasons set forth above, petitioner Arthur Young & Company prays that a writ of certiorari be issued to review the judgment below.

DATED: April 15, 1982
New York, New York

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B
(Former Fifth Circuit case, Section 9(1)
of Public Law 96-452—October 14, 1980.)

Cases Nos. 79-2429, 80-5297

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ROGER L. SUMMER,

*Plaintiff-Appellant/Appellee,*

—v.—

LAND & LEISURE, INC., *et al.*,

*Defendants-Appellant/*
*Cross-Appellants.*

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Before GODBOLD, Chief Judge, FRANK M. JOHNSON, Jr. and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

On February 23, 1978, appellant Roger L. Summer (referred to as "Summer" or "plaintiff" or "appellant") filed this complaint in the United States District Court for the Southern District of Florida. Subject matter jurisdiction was predicated on alleged violations of the federal securities laws; however, several state law claims were also asserted under the district court's pendent jurisdiction. Summer was an investor in Land & Leisure, Inc. ("L&L"). Between June 24, 1971, and January 3, 1973, he purchased, in eleven installments, a total of 9,500 shares of L&L common stock at a total cost of approximately

$54,000. L&L stock did not fare well over the years. In his complaint, Summer alleges a conspiracy or scheme among the several defendants to defraud investors and to conceal the fraud. Count I of the complaint alleges a claim under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C.A. § 78j(b), and Rule 10(b)-5 of the Securities and Exchange Commission; Counts II and VI allege claims of common law fraud; Counts III, IV and V allege claims under §§ 11, 12(2), and 17 of the Securities Act of 1933, 15 U.S.C.A. §§ 77k, 77l(2) and 77q; Count VII alleges a claim under the Florida Blue Sky Law, Fla. Stat. §§ 517.21 and 517.301; Count VIII is a state claim of mismanagement and breach of fiduciary duties by corporate officers and directors; and Count IX is a state law claim for breach of the corporate opportunity doctrine. Defendants are Land & Leisure, Inc., and Guy B. Bailey, Guy B. Bailey, Jr., Areca Stone Bailey, Charlotte Babcock, Robert Little, Jerome Grossman, and Robert Fischer, who were at one time or another officers or directors or both of L&L; and Raymond James Associates, Inc. ("Raymond"), the lead underwriters for L&L; and the accounting firm of Arthur Young & Co. which prepared the registration statement and prospectus for L&L. We sometimes refer to all defendants collectively as "defendants." We sometimes refer to all defendants except Arthur Young and Raymond as the "corporate defendants," i.e., the corporation, Land and Leisure, Inc., and its several officers or directors. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The district court granted the motion as to all the claims under federal law on the ground that they were barred on their face by the applicable statutes of limitations and, as there were no pending federal questions, exercised its discretion to dismiss the claims under state law. Furthermore, the district court determined that the complaint was frivolous and awarded attorney's fees and costs in favor of the defendants, except Little, in the aggregate amount of $32,480. *See* § 11(e) of the Securities Act of 1933, 15 U.S.C.A. § 77k(e).

## I. Applicable Statutes of Limitations for Claims Under the Federal Securities Laws

Our first task is to determine the applicable statutes of limitations for the federal securities claims. We note that more than seven years elapsed between the first purchase of stock and the filing of the complaint, and more than five years passed from the last purchase of stock and the filing of the complaint.

### A. The Section 10(b) Claims.

Since § 10(b) of the 1934 Act, 15 U.S.C.A. § 78j(b), provides no statute of limitations, we look to the most analogous state statute of limitations. Under Florida law, Fla. Stat. § 517.21, provides for a two-year statute of limitations on actions for violations of Florida securities laws. *See Nortek, Inc. v. Alexander Grant & Co.*, 532 F.2d 1013 (5th Cir.), *rehearing denied*, 536 F.2d 624 (1976). Section 517.21 was repealed on July 1, 1976, by Chapter 76-168, § 3 of the Laws of Florida of 1976. *See Vigman v. Community National Bank & Trust Co.*, 635 F.2d 455, 460 n.10 (5th Cir. 1981). Fla. Stat. § 95.-11 (5)(d) (amended 1975) provides for a three-year statute of limitations on actions for fraud. *See Vigman v. Community National Bank & Trust Co., supra.* We note that § 95.11(5)(d) was changed from three to four years on January 1, 1975. *See Vigman v. Community National Bank & Trust Co.*, 635 F.2d at 460 n.11. The district court applied the four-year statute. Since the last sale was on January 3, 1973, and since the complaint was filed on February 23, 1978, which is more than four years, the district court concluded that plaintiff's § 10(b) and Rule 10(b)-5 claims were barred. We need not decide which of the foregoing statutes of limitations apply in this case. Even assuming that the longest, the four-year statute, applies, it is clear that plaintiff's § 10(b) and Rule 10(b)-5 claims are barred, in the absence of circumstances which would toll the statutes.

**B. The Section 17 Claims.**

With respect to the claims under § 17 of the 1933 Act (a portion of Count III), the appropriate state statute of limitation also governs. *See Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980); *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975). The district court correctly applied to the § 17 claims the same analysis as for the Section 10(b) and Rule 10(b)-5 claims. *See Nortek, Inc. v. Alexander Grant & Co.*, *supra*; *Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967). Accordingly, the § 17 claims are also barred, unless the period was tolled.

**C. The Section 11 and Section 12(2) Claims.**

Sections 11 and 12(2) of the 1933 Act, 15 U.S.C.A. §§ 77k and 77l(2) (a portion of Count III, Count IV and Count V), however, are governed by the limitation period contained in § 13 of the 1933 Act, 15 U.S.C.A. § 77m, which provides:

> No action shall be maintained to enforce any liability created under § 77k or § 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, . . . In no event shall any such action be brought to enforce a liability created under § 77k . . . of this title more than three years after the security was bona fide offered to the public, or under § 77l(2) of this title more than three years after the sale.

The district court held that the passage of more than three years between the alleged wrongful act and the commencing of this action is an absolute bar to the claims under §§ 11 and 12(2), *i.e.*, the normal rules of tolling do not apply after three years. Appellant does not seriously contest this ruling and it is consistent with a view of the majority of the courts to consider the question. *See Brown v. Producers Livestock Loan Co.*, 469 F.Supp. 27 (D. Utah 1978); *Turner v. First Wisconsin*

*Mortgage Trust*, 454 F.Supp. 899 (E.D. Wis. 1978); *Cowsar v. Regional Recreations, Inc.*, 65 F.R.D. 394 (M.D. La. 1974). The Tenth Circuit has interpreted the almost identical language in the Interstate Land Sales Full Disclosure Act to constitute an absolute bar. *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d at 1042-43. *But see In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 337 (N.D. Okl. 1975). The Court in *Turner v. First Wisconsin Mortgage Trust*, *supra*, rejected the plaintiff's argument that the three-year period could be tolled by the defendant's concealment of the claim. "Otherwise [§ 13] would create a limitation period for all suits of one year from the time discovery of the untrue statements or omissions should have been made, and the three-year provision would serve no purpose at all." 454 F.Supp., at 911. We find this reasoning convincing. We hold that the normal tolling rules are not applicable to toll the three-year period. Accordingly, we hold that appellant's claims under § 11 and § 12(2) are absolutely barred and affirm the district court's dismissal of those claims.

**II. Did Appellant Allege Sufficient Facts Which Would Toll the Statute of Limitations on the § 10(b) and § 17 Claims?**

While we relied upon state law for the appropriate statute of limitations, federal law determines "when the clock starts to running" for purposes of the statute of limitations. *See Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 8 (5th Cir. 1967). "Under federal law, a cause of action under § 10(b) and Rule 10(b)-5 . . . accrues when the aggrieved party has either actual knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof." *See Vigman v. Community National Bank & Trust Co.*, 635 F.2d at 459. Appellant claims that by the exercise of due diligence he did not discover the claims now asserted until 1977, within one year before the complaint was filed, and well within the appropriate statute of limitations whether it be two, three or four years.

We turn to the allegations of the complaint, particularly those of concealment of the facts by the defendants, which would tend to establish that plaintiff exercised due diligence in discovering the claims which he now asserts. The allegations throughout the complaint which would establish appellant's due diligence or concealment of facts by the corporate defendants fall into three categories:[1] (1) that the defendants conspired to fail to file required reports with the Securities and Exchange Commission, to fail to file and mail stockholders reports and proxy statements, and to fail to call annual stockholders meetings; (2) that defendants attempted to lull appellant by telling him that reports on L&L's financial condition would be forthcoming and that all was well with L&L; and (3) that defendants conspired to prevent the appellant from learning the true condition of the corporation by denying appellant access to corporate books and records, by falsely advising appellant that records had been lost or were unavailable, and by making false entries in the books and records. Appellant asserts, as a consequence of these actions, he did not reasonably discover the existence of the claims until 1977.

We are mindful of the standard for ruling on a Rule 12(b)(6) motion: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). In granting the defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6), the district court held, as a matter of law, that the

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1 The allegations of concealment are not contained within each and every count of the complaint; however, the allegations are contained at various points in the complaint. We believe it would be contrary to the liberal reading which we must give to a complaint upon motion to dismiss to consider the allegations of concealment only as to those counts in which the allegations are set forth. Having made such allegations with respect to some counts, and there being a reasonable inference that the allegations would likewise apply to the other counts, we surely cannot conclude that it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief.

plaintiff was aware of facts which would have disclosed the alleged fraud. The facts relied upon by the district court were only three: first, Summer's knowledge that the defendant corporation did not hold annual stockholders' meetings; second, his knowledge that the defendant corporation did not send out annual stockholders' reports; and third, his knowledge of the sharp decline in the value of the stock.

With respect to the decline in the price of the Land and Leisure stock, we note that the bulk of Summer's purchases occurred after the substantial price decline, and that all the purchases were made through the underwriter, Raymond. It is a reasonable inference from the pleadings that the independent accounting firm, Arthur Young, continued to provide accounting services throughout the relevant time, including in particular after the time of the substantial price decline. If the price decline did not put the accounting firm and the underwriter on notice, it is a reasonable inference that it would not have put Summer on notice. We can conceive of several factual situations in which a price decline, under the circumstances here, would not be indicative of fraud in the least, *e.g.*, a depressed real estate market caused either by tight money or recession.[2]

With respect to the failure to send annual stockholders' reports and hold annual stockholders' meetings, none of the defendants have cited any case, nor have we found one, which holds that the mere failure to send such reports or hold such

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2 Defendants cite several cases in which a plaintiff's knowledge of the declining market price of securities has been a factor indicating that plaintiff had knowledge of facts which should have led to the discovering of the fraud. However, these cases apparently involved misrepresentations relating to the value of the securities—*e.g.*, that the investment would produce a stable income with no risk—so that sharp declines in value shortly after such misrepresentation would in fact tend to indicate that the representation was false. *See Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 644 F.2d 690 (8th Cir. 1981); *Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340 (8th Cir. 1980); *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980); and *Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974). In the instant case, a decline in market price is not inconsistent with the representations complained of nor otherwise suggestive of the fraud alleged.

meetings is sufficient to put an investor on notice of facts which in the exercise of due diligence would have led to actual knowledge of fraud.[3]

In the present posture of this case[4]—a Rule 12(b)(6) dismissal—the three facts relied upon by the district court are simply not sufficient to justify a conclusion that "it appears beyond doubt that the plaintiff can prove no set of facts" which would adequately explain why plaintiff did not become suspicious. In fact, Summer has made significant allegations tending to explain his lack of suspicion and tending to support his allegation of due diligence. As against all defendants, Summer has alleged generally a conspiracy to fraudulently conceal from plaintiff the material facts. As against the corporate defendants, Summer specifically alleged misrepresentations on numerous occasions that reports of financial condition would be forthcoming, that all was well with the defendant Land and Leisure, and that annual meetings would be forthcoming. In addition, Summer alleged that he was denied access to records, and that there were attempts to prevent him from learning the true financial condition by hiding records, removing records, making false entries in records, and misrepresenting that records were also lost or destroyed. Accordingly, we hold with respect to all defendants, except Arthur Young and Raymond, that the district court erred in dismissing plaintiff's complaint pursuant to Rule

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3 Arthur Young's reliance upon *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978), is misplaced. *Cook* did not hold that the failure to hold a stockholder's meeting constituted notice. In *Cook*, a stockholders' meeting was in fact held, and plaintiff would have become aware of the misrepresentations had plaintiff attended. *Id.* at 696, n. 22. Nevertheless, the First Circuit declined to adopt an inflexible rule imputing such knowledge to a shareholder who did not attend the meeting, rather, the court held only that the failure to attend was one factor to be weighed adversely to plaintiff's diligence. *Id.* at 695, n. 21.

4 We note that most of the cases relied upon by the defendants were appeals from summary judgments rather than 12(b)(6) dismissals. The plaintiffs were allowed to support their claim with matters outside the pleadings.

12(b)(6). In *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967), we stated:

> We disagree, however, with its disposition of the issue of due diligence on motions for summary judgment.
>
> Recognizing that "* * * the question whether a party had sufficient opportunity, so that in the exercise of reasonable diligence he would have discovered the facts forming the basis of his cause of action, may raise issues of fact which would have to be tried to a jury; * * *", the learned judge, on the facts contained in the record before us, treated it as a question of law to be determined by the court and arrived at the ultimate conclusion that:
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> "Considering the depositions, documents and affidavits filed herein, there can be no question that plaintiff was put on notice as to the facts constituting its alleged cause of action no later than early September, 1961." We note in passing that neither of the four cases relied upon by the trial court to support this result involved adjudication upon a motion for summary judgment.
>
> The concept of due diligence is not imprisoned within the frame of a rigid standard; it is protean in application. A fraud which is flagrant and widely publicized may require the defrauded party to make immediate inquiry. On the other hand, one artfully concealed or convincingly practiced upon its victim may justify much greater inactivity. The presence of a fiduciary relationship or evidence of fraudulent concealment bears heavily on the issue of due diligence.

386 F.2d at 9 (footnotes omitted). Of course we express no opinion as to whether the record in the instant case on remand will develop such that the due diligence issue can be resolved on summary judgment, or whether a full trial will be necessary. However, we are confident that it was error to conclude that "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

*Conley v. Gibson*, 355 U.S. at 45-6, 78 S.Ct. at 101-02. Accordingly, the dismissal of the complaint was error with respect to all defendants except Arthur Young and Raymond.

Because the district court concluded that Summer had knowledge of facts which should have led to his discovery of the fraud, the district court did not address the subsidiary argument of Arthur Young and Raymond that the complaint contains only conclusory allegations as against those two defendants. We agree with Arthur Young and Raymond that the complaint includes only conclusory allegations of fraudulent concealment as against Arthur Young and Raymond. Rule 9(b), Fed. R. Civ. P., requires that the elements of fraud be pleaded with particularity. Accordingly, we affirm the judgment of the district court to the extent that it dismissed the complaint with respect to Arthur Young and Raymond, but we hold that on remand Summer be granted leave to amend to assert more particularized allegations as against Arthur Young and Raymond, if he can do so. See 2A Moore's Federal Practice, ¶ 9.03 (indicating that dismissal for failure to comply with Rule 9(b) is almost always with leave to amend).

**III. The Other Issues on Appeal**

Our disposition necessarily supplants the district court's determination that the complaint was without merit and that the defendants were entitled to attorney's fees. We therefore vacate the award of attorney's fees, which also makes it unnecessary for us to address the issues on cross-appeal relating to the amount of attorney's fees. Likewise, we reinstate the pendent state claims.

**IV. Conclusion**

We affirm the district court's dismissal of the § 11 and § 12(2) claims against all defendants. As against all defendants except Arthur Young and Raymond, we reverse the district court's dismissal of the § 10(b) and Rule 10 (b)-5 claims and the § 17 claims and remand for further proceedings not inconsistent with this opinion. As to Arthur Young and Raymond,

we affirm the dismissal of the § 10(b) and Rule 10(b)-5 claims and the § 17 claims, but direct that leave to amend be granted. The district court's award of attorney's fees is vacated. The pendent state claims are reinstated. All costs of this appeal shall be taxed against appellees.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

## APPENDIX B

**1. Order of May 2, 1979:**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-810-Civ-JAG

ROGER L. SUMMER,

*Plaintiff,*

—v.—

LAND & LEISURE, INC., *et al.*,

*Defendants.*

ORDER

This cause came before the Court on the various Motions of the defendants to dismiss. This is an action brought pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, the Florida Blue Sky laws, F.S. 517.21 and F.S. 517.301 and pendent jurisdiction. More specifically, Count 1 of the Complaint is based on § 10b of the 1934 Act and Rule 10b-5; Count 2 is based on common law fraud; Count 3 is based on § 11 and § 17 of the 1933 Act; Count 4 is based on § 11 of the 1933 Act; Count 5 is based on § 12(2) of the 1933 Act; Count 6 is based on common law fraud; Count 7 is based on F.S. 517.21 and F.S. 517.301; Count 8 is based on the common law of Florida and Count 9 is also based on the common law of Florida.

The Court has carefully reviewed the 40 page Complaint, defendants' Motions to dismiss and the memoranda filed in support of and in opposition to the Motions to dismiss. The Motions to dismiss filed by the various defendants allege that

plaintiff's claims are all barred by the applicable statutes of limitations.

Count 1, as stated, is brought pursuant to § 10b of the 1934 Act, and Rule 10b-5. Since the 1934 Act does not have its own statute of limitations, the Court must look to the most closely analogous state statute of limitations, which in this case is F.S. 517.21 which provides a two year limitation period. *Nortek, Inc.* v. *Alexander Grant & Co.*, 532 F.2d 1013, 1015 (5th Cir. 1976). F.S. 517.21 was repealed, effective January 1, 1975, therefore the Court must apply a different statute subsequent to that date. Applying the statute of limitations for fraud, F.S. 95.11(3), the limitation period would be four years.

The Complaint states that plaintiff purchased an aggregate sum of 9,500 shares of common stock of defendant Land & Leisure. The first shares were purchased on June 24, 1971 and the last purchase was made on January 3, 1973. The Complaint was filed February 23, 1978. Applying the two year limitation period to all but the last purchase, plaintiff's claims for purchases from June 24, 1971 through December 27, 1972 are time barred. Applying the four year limitation period to the last sale on January 3, 1973, this claim is also time barred.

In determining when the clock starts to run for the purpose of applying a borrowed state statute of limitations for a federally created remedy, federal law controls. *Azalea Meats, Inc.* v. *Muscat*, 386 F.2d 5 (5th Cir. 1967). The statute of limitations in a § 10(b) action begins to run from the time a person has actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation. *Aboussie v. Aboussie*, 441 F.2d 150 (5th Cir. 1971).

The statute of limitations may be tolled by the equitable doctrine of fraudulent concealment. However, in order to invoke the doctrine, a party must have remained ignorant of the fraud without any fault or want of diligence or care on his part. A party may not merely rely on his own unawareness of the facts or law to toll the statute, but must show he has exercised reasonable care and diligence in seeking to learn the facts which would have disclosed the fraud. In other words,

the statutory period ". . . [does] not await the appellant's leisurely discovery of the full details of the alleged scheme . . .". *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970).

Normally the concept of due diligence is one involving factual issues not appropriate for summary treatment. *See Azalea Meats, Inc., supra*. However, where it is clear from the face of the Complaint, plaintiff's own allegations, that plaintiff knew facts which should have put him on notice, dismissal is appropriate. *See Klein v. Bower, supra*; *Berry Petroleum v. Adams & Peck*, 518 F.2d 401, 412 (2d Cir. 1975).

Plaintiff, in his Complaint, alleged that defendants failed to send annual reports or call annual shareholders meetings, as well as failing to supply plaintiff with financial information requested. Defendants argue that these facts were sufficient to place plaintiff on notice and to preclude application of the tolling doctrine. Plaintiff knew in 1971 and 1972 of the defendants failure to send reports or have the shareholders meetings, and was aware of the sharp decline in the value of the stock. Plaintiff contends that this is an issue for trial.

As stated previously, plaintiff's § 10(b) and 10b-5 claim is barred by the limitation statutes, unless the statutes are tolled. Inasmuch as it appears from the face of the Complaint that plaintiff was aware of facts which would have disclosed the alleged fraud and therefore due diligence is absent, the Court finds that plaintiff's § 10(b) and 10b-5 claims are barred.

Counts 3, 4 and 5 are brought pursuant to § 11, 12(2) and 17 of the 1933 Act. As to § 17 of the Act, the state statute of limitations applies and as dicussed with regard to Count 1, the action pursuant to § 17 is also barred by that state statute of limitations. Actions brought pursuant to § 11 and 12(2) are governed by the statute of limitations set forth in § 13 of the 1933 Act which provides that an action must be brought within one year after discovery should have been made by the exercise of due diligence and further provides that nothing under § 11 or 12(1) shall be brought more than 3 years after the security was bona fide offered to the public or under § 12(2) within 3 years of the sale. As previously stated, the last sale in issue was on January 3, 1973 and plaintiff at that time was aware of

facts which would have lead to discovery of the untrue statements alleged to have been made. Accordingly, the tolling doctrine cannot apply and the actions brought pursuant to § 11 and 12(2) of the 1933 Act are barred by the statute of limitations set forth in § 13 of the Act.

Counts 2, 6, 8 and 9 based on common law fraud are before the Court pursuant to pendent jurisdiction. Inasmuch as the federal claims are barred by the statutes of limitations, these counts based on pendent jurisdiction must also be dismissed. Count 7 based on the Florida Blue Sky laws must be dismissed because the federal claims are barred and pendent jurisdiction does not exist. Furthermore, the claims based on F.S. 517.21 and F.S. 517.301 are also barred by the statute of limitations.

Accordingly, it is

ORDERED and ADJUDGED that defendants' Motions to dismiss are granted and this cause is hereby dismissed as barred by the statutes of limitations and lacking pendent jurisdiction.

DONE and ORDERED at Miami, Florida on this 2nd day of May, 1979.

/s/ JOSE A. GONZALEZ, JR.
District Judge

cc: all counsel

**2. Order of January 30, 1980:**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-810-CIV-JAG

ROGER L. SUMMER,

*Plaintiff,*

—v.—

LAND & LEISURE, INC., GUY BAILEY, SR., GUY BAILEY, JR., ROBERT LITTLE, JEROME GROSSMAN, ARECA STONE BAILEY, CHARLOTTE BABCOCK, ARTHUR YOUNG & COMPANY, RAYMOND JAMES & ASSOCIATES, INC., and ROBERT R. FISCHER,

*Defendants.*

ORDER

THIS CAUSE is before the Court on the respective Motions of various defendants pursuant to Section 11(e) of the Securities Act of 1933, 15 U.S.C. § 77k(e) which authorizes an award of reasonable attorneys' fees if the "court believes the suit or the defense to have been without merit . . ."

In determining that an award of attorneys' fees is appropriate the Court must find that the plaintiff "brought the action in bad faith or that the complaint, on its face, is without merit and thus unlikely to succeed." *Linchuck v. Cooper*, 43 FRD 382, 384 (S.D.N.Y. 1967). The cases considering an award of attorneys' fees in an action based on the Securities Act of 1933 unanimously hold that the statutory language "without merit" means "bordering on frivolity and not merely unconvincing." See *Klein v. Shields & Company*, 470 F.2d 1344, 1347 (2nd Cir. 1972).

The action in this case arose out of a purchase of securities made by plaintiff during a three-year period from 1971

through 1973. The complaint which was filed February 23, 1978, included allegations of violations of the Securities Act of 1933, the Securities Exchange Act of 1934, Florida Blue Sky laws and common law fraud.

The defendants moved to dismiss the case on the grounds that the action was barred by the applicable statutes of limitations.

On May 2, 1979, the Court granted the respective motions to dismiss.

Each count of the complaint is barred by the statutes of limitations. Further the complaint fails to allege facts indicating that the statute should be tolled due to the equitable doctrine of fraudulent concealment. On the contrary, the complaint shows that the plaintiff knew or reasonably should have known of the alleged violations in 1971 and 1972. For example, the complaint states that the defendants did not supply annual reports, or also furnish requested financial information. Plaintiff alleged that no shareholders' meetings occurred from 1971 to the time the complaint was filed. Plaintiff was aware of the sharp decline in the stock's value.

Plaintiff's cause of action, brought six years after the time when plaintiff should have been placed on notice of defendant's wrongdoing, is clearly barred by the statute of limitations. See this Court's order herein dated May 2, 1979.

For the reasons given in the Order of May 2, 1979, the Court finds that this complaint is on its face without merit and thus unlikely to succeed. Furthermore, the complaint is frivolous as a matter of law.

It is thereupon

ORDERED AND ADJUDGED that the Motions of defendants' Raymond James & Associates, Inc., Jerome Grossman, Arthur Young & Company, Charlotte Babcock, Areca Stone Bailey, Guy B. Bailey, Sr., Guy B. Bailey, Jr., Robert R. Fischer, and Land & Leisure, Inc. to award attorneys' fees are hereby GRANTED.

The respective defendants are directed to submit affidavits as to attorneys' fees within ten days setting forth the time

expended in defense of this matter together with an itemized list of the costs incurred.

DONE AND ORDERED in Chambers at the U.S. District Courthouse, Fort Lauderdale, Florida, this 30th day of January, 1980.

/s/ JOSE A. GONZALEZ, JR.
U.S. DISTRICT JUDGE

Copies furnished counsel

## APPENDIX C

### Excerpts from Summer's Complaint

Count III, Paragraph 30, in relevant part:

From the time the misrepresentations were made in the Prospectus until in or about October 1977, the Defendants LITTLE, ARTHUR YOUNG and RAYMOND, JAMES and each of them, aided and abetted by the others, engaged in a continuing course of conduct to graudulently [Sic] conceal the true financial condition of Defendant LAND & LEISURE from Plaintiff, and to prevent the Plaintiff from discovering any information regarding the affairs and status of Defendant LAND & LEISURE. Defendants, and each of them accomplished this concealment by causing the Defendant LAND & LEISURE to fail to file Annual Reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, annual reports to shareholders, proxy statements to shareholders, all as required under the Rules and Regulations of the SEC pursuant to the authority of the Securities Act of 1933 and the Securities Exchange Act of 1934, and further, in clear violation of the laws of the State of Florida as well as the aforementioned Federal Securities laws, failed to call or and hold a shareholders' meeting at any time from 1971 to and including the date of this pleading.

Count IV, Paragraph 41:

Plaintiff did not discover the falsity of the representations contained in the Prospectus until in or about October, 1977. Plaintiff could not reasonably have discovered the falsity of such representations contained in the Prospectus since the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, RAYMOND, JAMES, and LAND & LEISURE, and each of them, at all times material herein had engaged in continuing course of conduct and conspiracy to fraudulently conceal from the Plaintiff those misstatements of

material fact and omissions of material fact necessary in order to make the statements made therein not misleading in substantially the following manner.

(a) At a meeting of the Board of Directors of Defendant LAND & LEISURE held on or about October 12, 1971, a discussion was held by the then present Directors concerning the sale of Defendant LAND & LEISURE of 112 unregistered units of land in volation of the laws of the State of Florida. Further, the Directors discussed at said meeting a disclosure of such information could require LAND & LEISURE to make offers of recision to all who purchased such units of land and thereby effectively close Defendant LAND & LEISURE and abort the public offering then proceeding.

(b) Further, at the meeting of October 12, 1971, as aforesaid, it was disclosed that as a result of such sales of unregistered land, the sale of the collateralized subordinated sinking fund debentures had been suspended in August, 1971 by the unilateral act of the Defendant RAYMOND, JAMES.

(c) Notwithstanding the materiality of the foregoing events, no posteffective amendment of the Registration Statement and Prospectus then in effect was filed, nor was any current report on Form 8-K filed with the SEC, nor was any public disclosure of same made by the Defendants to Plaintiff, and the Plaintiff continued to make purchases of stock of Defendant LAND & LEISURE on or after said date, relying upon the Prospectus.

(d) On December 22, 1971, a meeting of the Board of Directors of Defendant LAND & LEISURE was held. At such meeting it was disclosed that Defendant LAND & LEISURE used for its general operating purposes, $220,000 of funds received from third party purchasers of its land, which funds should have been placed in a special escrow account to conform to Florida Land Sales Board requirements.

(e) It was further disclosed at the said meeting of December 22, 1971, that property represented to third party purchasers of tracts of land in WESTFIELD III as free and clear, was in fact encumbered by two mortgages and as a result thereof, the Defendant LAND & LEISURE was faced with having to rescind all WESTFIELD III sales and refund the purchase monies therefor to third party purchasers, which money Defendant LAND & LEISURE did not have.

(f) It was further disclosed at the said Board of Directors meeting of December 22, 1971, that the Defendant ROBERT LITTLE was on information and belief, using Defendant LAND & LEISURE as a vehicle for moving money into the United States from a Jamaican or Bahamian corporation, or both, ("laundering") for his own benefit, which money should have been taxed, but was not, and as a result, the Defendant LAND & LEISURE faced potential serious tax consequences with the United States Internal Revenue Service. At said meeting the hiring of special tax counsel to determine what liability, if any, was faced by the Defendant LAND & LEISURE as a result of these actions of the Defendant ROBERT LITTLE was discussed, however, no affirmative action was taken by the Board of Directors.

(g) As a result of the foregoing matters, the Board of Directors of the Defendant LAND & LEISURE should properly have publicly disclosed the aforementioned information through the filing of appropriate reports with the SEC on Form 8-K, and making a public announcement. Notwithstanding the said obligation, no matter was ever filed or disclosed to the public and the Plaintiff continued to make purchases of stock of the Defendant LAND & LEISURE after the date of said meetings.

(h) On or about February 15, 1972, a meeting of the Board of Directors of Defendant LAND & LEISURE was held. At this meeting the question of public disclosure of

the financial difficulties, as well as the other difficulties of Defendant LAND & LEISURE, as set forth hereinabove, were discussed and the aforesaid Defendants failed and refused to take the steps necessary to make public disclosure of the financial and other difficulties of the Defendant LAND & LEISURE, and in truth and fact, took affirmative action to keep such information from becoming public.

(i) On or about February 16, 1972, control of the Defendant LAND & LEISURE was sold to UNITED RESOURCES, INC., a Florida corporation. Control was acquired by the sale of the stock of certain insiders, to wit, Defendant ROBERT LITTLE, one L. R. BROOKS, Defendant JEROME GROSSMAN, and CORDWELL INTERNATIONAL DEVELOPMENTS, LTD. At said meeting UNITED RESOURCES, INC. caused the resignation of Defendant ROBERT LITTLE, and one THOMAS HAMILTON, OSCAR CORDERA, ARTHUR PAPAZIAN, and JACK LASONDER. In the places of the aforementioned Directors of the Defendant LAND & LEISURE, UNITED RESOURCES, INC. caused the election of the following individuals to the Board of Directors of the Defendant LAND & LEISURE, all of whom accepted their office, and served as Directors of the Defendant LAND & LEISURE at all times material herein, to wit, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, as well as one STEVEN W. ARKEY. Upon information and belief Mr. ARKEY subsequently resigned his position as a Director of the Defendant LAND & LEISURE on or about February 17, 1972.

(j) Upon information and belief, the new Board of Directors, GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK, knew or should have known, by the exercise of ordinary care, of the misstatements of material fact and of the omissions of material facts necessary in order to

make the statements made not misleading as contained in the Prospectus. That these Defendants knew or should have known or said misstatements and omissions is established by their admission at the Board of Directors' meeting of February 16, 1972, that they at all times were aware of the true condition of the Defendant LAND & LEISURE. Further, these Defendants, BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK, knew or should have known that those items as set forth hereinabove should have been disclosed by the filing of a posteffective amendment to the Registration Statement, or the filing of a current report on Form 8-K or through other public announcement. Notwithstanding the foregoing, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, joined in and continued the scheme and conspiracy to prevent disclosure of the true condition of the Defendant LAND & LEISURE to the investing public as well as this Plaintiff, and were aided and abetted in this regard by the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, and RAYMOND, JAMES, in order to protect the investment of UNITED RESOURCES, INC. (of which the Defendants BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK owned approximately 90% of the issued and outstanding stock) in the Defendant LAND & LEISURE.

(k) In order to accomplish the foregoing, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, from on or about February 16, 1972 to date, conspired with the former officers and directors of the Defendant LAND & LEISURE, to wit, ROBERT FISCHER, ROBERT LITTLE, and JEROME GROSSMAN, as well as with the lead underwriter of the Defendant LAND & LEISURE'S public offering, to wit, RAYMOND, JAMES, as well as with a new employee of the Defendant LAND &

LEISURE, to wit, ROBERT FISCHER, and the accounting auditing firm of the Defendant LAND & LEISURE, ARTHUR YOUNG, whereby LAND & LEISURE would not prepare nor file documents with the SEC notwithstanding the clear requirements of the Securities Act and the Exchange Act and the rules and regulations promulgated thereunder. In addition the Defendants further caused the Defendant LAND & LEISURE to fail to file and mail to shareholders annual reports detailing its financial condition as of a date certain, caused the Defendant LAND & LEISURE to fail to file and mail to shareholders proxy statements as required under Section 14 of the Exchange Act, and further, the Defendants BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK and ROBERT FISCHER, by virtue of their control of the Defendant LAND & LEISURE, caused LAND & LEISURE to fail to call a single annual meeting of shareholders during the period February 16, 1972 to date, notwithstanding the clear requirements for an annual meeting of shareholders under applicable Federal and State law as well as under the By-Laws of the Defendant LAND & LEISURE.

(l) In addition, the Defendant GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK, and ROBERT FISCHER, in their capacities as directors and/or officers of the Defendant LAND & LEISURE took affirmative action to prevent your Plaintiff from learning anything at all about the true condition of the Defendant LAND & LEISURE through the means and instrumentalities of interstate commerce, including the mails and telephonic communication, whereby they represented to your plaintiff on numerous occasions that reports on the financial condition would be forthcoming, that all was well with the Defendant LAND & LEISURE, and that annual meetings of shareholders as well as SEC reports would be forthcoming, when in truth and fact, they, and each of

them, knew or should have known in the exercise of ordinary care that such was not the case.

(m) Plaintiff was denied access to the books and records of the Defendant LAND & LEISURE, until suit was instituted in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in a case styled "Roger L. Summer v. Land & Leisure, Inc. and Robert R. Fischer", Case No. 77-14177. Even after your Plaintiff was allowed access to the books and records, the Defendant ROBERT FISCHER, aided and abetted by others whose names are presently unknown to your Plaintiff, attempted to prevent your Plaintiff from learning the true condition of the Defendant LAND & LEISURE by hiding records from your Plaintiff, by removing records supplied to the Plaintiff and hiding same, by deliberately and/or negligently causing false entries to be made in the books and records of the Defendant LAND & LEISURE, AND BY DELIBERATELY ADVISING YOUR Plaintiff that certain books and records were lost or destroyed when in truth and fact the same were in the possession, custody and control of the Defendant LAND & LEISURE, or its officers, employees or agents. At the time the false and misleading misrepresentations and omissions of material fact necessary in order to make the facts contained therein not misleading were made, they were known to the Defendants to be false and misleading, and were made by the Defendants with the intent to deceive and defraud the general public, purchasers of stock and debentures of the Defendant LAND & LEISURE in connection with the public offering then proceeding, and in particular, this Plaintiff.

81-1940

Office - Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO.

in the

# Supreme Court

of the

# United States

October Term, 1981

ARTHUR YOUNG & COMPANY,
*Petitioner,*

*vs.*

ROGER L. SUMMER, et al.,
*Respondents.*

## RESPONDENTS' JOINDER IN PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jesse C. Jones
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ARTHUR YOUNG & COMPANY,
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## RESPONDENTS' JOINDER IN PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Land & Leisure, Inc., a Florida corporation,[1] Guy B. Bailey, Areca S. Bailey, Guy B. Bailey, Jr., and Charlotte Babcock, Respondents, who were co-defendants/appellants with Petitioner, Arthur Young & Company, in the courts below and who have filed a separate Petition for a Writ of Certiorari in this Court, join in and support the Petition of Arthur Young & Company and adopt the arguments made in that Petition.

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[1]The following Florida corporations are affiliates of Land & Leisure, Inc.:

United Resources, Inc.
Country Club of Miami Corporation
G.B.B. Investments, Inc.
R.S. Investment Corporation
KGS Marine, Inc.
Phillips International
Marine Motor Sales, Inc.
Phillips Hardware Sales, Inc.
Atgar Development Corporation
Section 3 Property Corp.
U.R.I. Strawberry Hills Corporation
U.R.I. Harbor Point #1 Corporation
U.R.I. Harbor Point #2 Corporation
U.R.I. Hotel Corporation
Sunshine Utilities Company, Inc.
Area Utilities Maintenance Corporation
Section 2 Property Corp.
Section II Property Corp.
Section Two Venture Corporation
Patio Villas Development Corp.
Country Club of Miami Realty, Inc.
Country Club Center
URI Centers, Inc.
URI Centers of Nevada, Inc. (a Nevada corporation)
C & D Enterprises, Inc. (a Nevada corporation)

## CONCLUSION

For the reasons set forth in the Petition of Arthur Young & Company, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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81-1940

NO:

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OCTOBER TERM, 1981

ARTHUR YOUNG & COMPANY,

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vs.

ROGER L. SUMMER,

Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

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## QUESTION PRESENTED FOR REVIEW

Whether, pursuant to 28 U.S.C. § 1254(1), the Supreme Court should exercise its discretion to assert jurisdiction over a matter involving the longstanding and universally accepted practice of requiring district courts to try the merits of claims based upon Federal securities regulation rather than to allow dismissal pursuant to F.R.C.P. 12(b)(6), where the complaint raises genuine issues of fact in regard to the federal equitable tolling doctrine and plaintiff's exercise of due diligence in the pursuit of federally created rights and where defendants have concealed their (alleged) fraudulent activities.

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The trial court in the instant case, United States District Court for the Southern District of Florida, Judge Jose A. Gonzalez, Jr., presiding, granted Defendant's Motion to Dismiss for failure of Plaintiff to state a claim for which relief can be granted by Order dated May 2, 1979. (See Appendix B, Brief for Arthur Young & Company, p.12a). The trial judge followed the procedure set forth in Azalea Meats, Inc. v. Muscat for determining when the clock starts to run for the purpose of applying a borrowed state statute of limitations to a federally created cause of action. Appendix B, 13a citing 386 F.2d 5 (5th Cir. 1967). Furthermore, the trial judge stated the rule announced by the Fifth Circuit in Aboussie v. Aboussie, that "the statute of limitations in 10(b) actions begins to run from the time a person has actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation." (Appendix B, p.13a, citing Aboussie, 441 F.2d 150 (5th Cir. 1971).

However, the trial judge erroneously decided that application of the equitable tolling doctrine of fraudulent concealment as developed in Klein v. Bower, 421 F.2d 338 (2d Cir. 1970) was not warranted in the instant case because Summer did not exercise due diligence or care in discovery of facts which would have put him on notice of facts constituting fraud. Thus, the Fifth Circuit reversed the trial judge's erroneous decision that Summer's § 17 (Securities Act of 1933), Rule 10(b) and Rule 10(b)(5) (Securities Exchange Act of 1934) claims were time barred by the respective limitation provisions, "borrowed" from analogous Florida Statutes. (Appendix B, pp.13a-14a, citing Klein v. Bower, and Berry Petroleum v. Adams & Peck, 518 F.2d 401, at 412 (2d Cir. 1975).

The Fifth Circuit affirmed the trial court's decision that Summer's claims under § 11 and § 12(b) of the Securities Act were absolutely barred under that Act's express statute of limitations provision, but reversed the trial court's decision that Plaintiff Summer did not allege facts sufficient to toll the applicable state statute of limitations in regard to his § 10(b) and § 17 claims. Summer v. Land & Leisure, Inc., 664 F.2d 965 (5th Cir. 1981). The court reviewed the three facts the trial court found dispositive: (1) Summer's knowledge that Land & Leisure did not hold annual shareholder meetings; (2) that Land & Leisure failed to send out annual shareholder reports; and (3) Summer's knowledge of the price decline of Land & Leisure

shares. Id., at 969. After disposing of the Defendant's arguments, the Fifth Circuit held "the three facts relied upon by the district court are simply not sufficient to justify" a Rule 12(b)(6) dismissal. Id., at 970, as against all Defendants but Arthur Young & Company and Raymond James & Associates.[1]

Since the enactment of the Federal Rules of Civil Procedure, the various Circuits have consistently reversed judgments which result in final determination on mere pleading allegations alone. Sparks v. England, 113 F.2d 579 (8th Cir. 1940).[2] The proper test for determining whether dismissal or summary judgment is warranted in a particular case is whether there exists a dispute as to material facts upon which plaintiff can conceivably succeed, and not the likelihood of plaintiff's success. In a case involving the affirmative defense of a Pennsylvania statute of frauds, the Third Circuit reversed the district court's dismissal pursuant to Rule 12(b)(6); the Court reiterated the limited role of demurrer under the Federal Rules of Civil Procedure:

> "No matter how unlikely it may seem that the pleader will be able to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." Continental Collieries, Inc. v. Shober, 130 F.2d 631, at 635 (3d Cir. 1942).

Similarly, the Eighth Circuit stated that:

> "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty (sic) that the plaintiff would be entitled to no relief under any set of facts which could be proved in support of the claim." Leimer v. State Mutual Life Assurance Co., 108 F.2d 302, at 306 (8th Cir. 1940).

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[1]The Fifth Circuit granted Summer leave to amend as to these Defendants, determining that Summer's complaint did not, as to these Defendants, allege sufficient facts to invoke the equitable doctrine of tolling. Id., at 970-71.

[2]Note 1, supra.

In reversing the trial court in this case, the Fifth Circuit pointed out the judicial preference for reserving to the jury questions of fact in regard to plaintiff's due diligence as required under the equitable tolling doctrine. Summer, supra, at 970, citing Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967). In order to be entitled to a dismissal under F.R.C.P. 12(b)(6), defendants were required to show "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief," Id., at 970, citing Conley v. Gibson, 335 U.S. 45-46, 78 S.Ct. at 101-02. The Fifth Circuit stated that several factual situations in which the decline in the price of Land & Leisure stock "would not be indicative of fraud in the least, e.g., a depressed real estate market caused either by tight money or recession." Id., at 969. The Fifth Circuit pointed out the inconsistency in Defendant Arthur Young & Company's argument that the decline in price of Land & Leisure stock did or should have put the reasonable investor on notice of some type of fraud, in that Arthur Young, Land & Leisure's accounting firm, itself was not put on notice by the drop in price of its client's stock. Id.

Neither Land & Leisure's failure to hold annual shareholder meeting nor its failure to send reports thereof were "sufficient to put an investor on notice of facts which in the exercise of due diligence would have led to actual knowledge of fraud." Id.[3] The Court distinguished Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978) in which a shareholder meeting was in fact held. No shareholder meeting from which Summer could have been put on notice as to Defendant's fraudulent activities was held in the instant case. However, implicit in the Fifth Circuit's statement of the correct rule in Cook, i.e., "the failure to attend [shareholder meetings] was one factor to be weighed adversely to plaintiff's diligence," Id., at 969, note 3, is the Fifth Circuit's approval of the cumulative approach to the factors bearing upon the issue of due diligence. In light of the Fifth Circuit's explicit and exhaustive analysis of the factors which Defendant contends add up to notice of injury and lack of due

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[3]Defendant erroneously argues that the revised provision of Florida's Corporation Code, F.S. 607.084, required Land & Leisure to hold shareholder meetings. F.S. 607.084 did not become effective until January 1, 1976.

diligence, Defendant Arthur Young's contention that the Court erroneously considered the relevant factors disjunctively, rather than conjunctively, is clearly without merit. (Arthur Young's Brief, p.11). The Fifth Circuit merely held that given the totality of the facts presented to the trial court, Defendants were not entitled to a dismissal as a matter of law.

The cases upon which Defendants rely can be distinguished on their respective facts. In Berry, unlike the instant case, facts supporting a decision for defendant appeared in the complaint. Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975). Plaintiff's argument in Berry that plaintiff could not have known about the corporation's financial difficulties was negated by the fact that a proxy statement was circulated. Id., at 410, note 9. Moreover, Berry is contrasted with the instant case by the direct action taken by the SEC in suspending trade in the corporation's stock. Id. Summer did not have the benefit of a publicized consent order secured by the SEC nor notice of prior private actions brought against the Defendant on substantially similar facts, as in Berry, since his was the first suit to be brought against the Defendant. Id., at 410. Especially noteworthy in distinguishing Berry from the instant case is that res judicata provided alternative grounds for summary disposition as to all but four class members. Id., at 411.

Likewise, the publication of earlier suits against the defendants involving the same transactions in State of Ohio v. Peterson, et al., 651 F.2d 687, at 689-90 (10th Cir. 1981), distinguishes it from the instant case. Furthermore, plaintiff's delay in bringing suit in Peterson was attributable to the Attorney General's admitted negligence and apathy. Id., at 691. The Tenth Circuit in Peterson reaffirmed the "continuing vitality of the Holmberg procedure in which federal courts borrow a state limitations period as a matter of judicial convenience." Id., at 691. The Court also limited the holding in Board of Regents v. Tomanio, barring a federal judge from exercising equitable power to toll the limitations period where the borrowed state statute contained no provision for tolling under the circumstances presented, to the civil rights provisions of Title 18 and Title 42, U.S. Code. Id., at 691, citing Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790 (1980). Thus, the Tenth Circuit reaffirmed the Eaplin rule, wherein federal law controls the tolling of a limitations period borrowed

from state law. Id., at 691, citing Esplin v. Hirsche, 402 F.2d 94, at 104 (10th Cir. 1968), cert. den. 394 U.S. 928, 89 S.Ct. 1194 (1969).

The Tenth Circuit's opinion upholding summary disposition of a 10(b) claim on the particular facts of the case is enlightening for its tracing of the development of equitable tolling. Id., at 692-93, citing Bailey v. Glover, 21 Wall. (88 U.S.) 342 (1875) and Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582 (1946). The Tenth Circuit expounded two lines of cases, the first in which summary disposition was unwarranted and the second where summary disposition was warranted. The cases cited were determined on their particular facts and no one factor predominates in determining under which category of cases a particular case falls. While the Tenth Circuit in Peterson concluded that the facts there justified summary disposition, supra, the cases supporting that decision are distinguished from the instant case. Id., at 692, note 9.

The federal rules, which are liberal in regard to pleadings, provide the proper procedure for district courts faced with a complaint it determines insufficiently states a claim, i.e., a dismissal with leave to amend. Wolford v. Equity Resources, 424 F.Supp. 670 (S.D. Ohio 1976). Thus, where a plaintiff's complaint alleging violation of Fair Labor Standards Act 29 U.S.C.A. § 201 failed to show that plaintiffs were employed in commerce or for production of goods for commerce, and plaintiffs were apparently excepted from the provisions of § 135 of the Act, dismissal was held inappropriate. DeLoach v. Crowleys, Inc., 128 F.2d 378 (5th Cir. 1942). Further, the Fifth Circuit has consistently upheld the rule followed by the various Circuits that such cases are generally to be tried on the merits. Id., at 379.

## CONCLUSION

Contrary to the factual situation in Peterson, it cannot be said of the instant case that Summer "slept on his rights." Rather, Plaintiff Summer took affirmative action, inter alia, bringing suit against Land & Leisure to force disclosure, supra. The law does not require an aggrieved party to have proceeded from the outset as if he were dealing with thieves. Hudak v. Economics Research Analysists, Inc., 499 F.2d 966, at 1002 (5th Cir. 1974). Given the factors enumerated in Azalea Meats, Inc., 386 F.2d at 9, the "artfully concealed" and "convincingly practiced" fraud perpetrated upon Summer, the fraudulent concealment thereof together with the presence of fiduciary relationship the defendants owed him as a shareholder, at the very least, raised questions of fact sufficient to entitle Summer to his day in court and to an adjudication of his cause on the merits.

DATED May 25, 1982.

Respectfully submitted,

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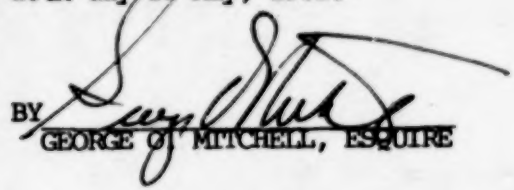
BY _____
GEORGE O. MITCHELL, ESQUIRE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail to CARL D. LIGGIO, ESQUIRE, and EUGENE R. ERBSTOESSER, ESQUIRE, Arthur Young & Company, 277 Park Avenue, New York, New York 10172 and PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A., 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, on this 25th day of May, 1982.

BY 
GEORGE O. MITCHELL, ESQUIRE

Office - Supreme Court, U.S.
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CLERK

No. 81-1940

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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ARTHUR YOUNG & COMPANY,

*Petitioner,*

—v.—

ROGER L. SUMMER,

*Respondent.*

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## REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

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## INTRODUCTORY STATEMENT

In its Petition for Certiorari, Arthur Young & Company ("AY")[1] advanced three reasons why this Court should review the decision of the United States Court of Appeals for the Eleventh (nee Fifth) Circuit.[2] For the most part, respondent Summer ignores these arguments and, instead, advances as his reason for this Court not reviewing the decision, the common refrain that all cases should be tried on the merits rather than dismissed on "technical grounds" such as the statute of limitations. This Court has repeatedly rejected this argument especially in an opinion of this Court referred to by Summer.[3]

In the one instance in which Summer addresses the merits of an argument raised in AY's Petition, his response not only demonstrates the fallacy of his and the Circuit Court's position, but it emphasizes the existence of a substantial conflict among the circuits.

Finally, AY has now had the opportunity to study the certiorari petition in *Herman & MacLean* v. *Huddleston*, Dkt. No. 81-680, *cert. granted*, 50 U.S.L.W. 3802 (April 5, 1982), which it was unable to obtain prior to filing its Petition. A review of that petition more clearly demonstrates both the identity and congruity of certain of the issues in that case and this case; and that by granting certiorari and consolidating this action with *Herman & MacLean*, the fullest exploration is possible of the important policy questions presented by these actions.

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1. All abbreviations and other references used are consistent with those used in the Petition, which is referred to as "Pet." Summer's Opposition Brief is referred to as "Opp. Br."

2. The co-defendants in this action, Raymond, James Associates, Inc. and the L&L group, have filed separate certiorari petitions from the decision of the Court of Appeals. Nos. 81-2001 and 81-2060, respectively. Each has since filed a joinder in this certiorari petition.

3. In Opp. Br. at 5, Summer refers to the decision of this Court in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), as having somehow been limited by the Tenth Circuit. Summer's attempt to limit *Tomanio* is understandable because there this Court again made it clear that "[s]tatutes of limitations are not simply technicalities. On the contrary, they have been respected as fundamental to a well-ordered judicial system." *Id.* 446 U.S. at 487; *see also* Pet. at 6-7.

## I.

## A CLEAR CONFLICT EXISTS BETWEEN THE CIRCUITS ON THE SCOPE AND APPLICATION OF THE FEDERAL EQUITABLE TOLLING RULE

Summer argues that the Fifth Circuit properly determined that whether plaintiff acted with due diligence to avail himself of the federal equitable tolling rule is a fact question reserved solely to the jury. This argument, as well as the Fifth Circuit's opinion, misconstrues the nature of the jury's role as it relates to application of the federal equitable tolling rule.

Where what plaintiff did or did not do (or knew or did not know) is in dispute, the jury's fact finding role remains inviolate as to *those* disputed facts. But once those facts are not in dispute, whether equitable tolling is available is no longer a jury issue but one of law for the Court to be determined by the application of an objective standard of conduct.[4]

This statement of the law (and the concomitant conflict among the circuits) is clearly demonstrated by two very recent circuit court opinions[5]—*Kramas* v. *Security Oil & Gas, Inc.*, 672 F.2d 766 (9th Cir. March 26, 1982); *Campbell* v. *Upjohn Co.*, ___ F.2d ___, [Current Binder] (CCH) FED. SEC. L. REP. ¶ 98,655 (6th Cir. April 29, 1982). In determining the applicability of the federal equitable tolling rule, both circuits, contrary to what the Court of Appeals did here, applied an objective standard in measuring due diligence and treated it as a question of law for the court.

Thus in *Kramas*, which, as here, involved a claim of fraud in connection with an offering prospectus and registration statement filed pursuant to the federal securities laws, the Ninth Circuit affirmed summary judgment for the defendant because the facts

4. Here, the facts as to Summer's conduct and the attendant circumstances were, for purposes of this motion and the judgment, based solely on the allegations in Summer's pleading and deemed true. As such there can be no factual issue for the jury and the question is solely one of law for the court.

5. One was decided subsequent to the filing of the petition and the other was decided just before the petition was filed, but publicly reported almost simultaneous with the filing of this petition.

demonstrated that plaintiff failed to exercise the due diligence required of him and that he knew or should have become aware of the alleged fraud. 672 F.2d at 770-71. The Ninth Circuit observed that although issues of due diligence sometimes present questions of fact, a plaintiff's "reasonable diligence is tested by an *objective* standard, *Fox* v. *Kane-Miller Corp.*, 542 F.2d 915, 917 (4th Cir. 1976). . . ." *Id.* at 770. (Emphasis added.).

It was of no avail for the *Kramas* plaintiff merely to assert that the statute was tolled because he had continued confidence in the defendant. Whether the plaintiff *subjectively* continued to repose such confidence is irrelevant; rather the pertinent inquiry is whether, viewed *objectively*, "in the exercise of reasonable diligence [the plaintiff] should have been aware of defendants' allegedly fraudulent conduct." *Id* at 771. (Citation omitted.)[6]

The Sixth Circuit's opinion in *Campbell* v. *Upjohn Co.*, *supra*, is even more closely analogous to the case at Bar—again highlighting the conflict between the circuits. In *Campbell*, summary judgment was affirmed in favor of the defendant in a §10(b) case despite the plaintiff's allegations that the fraud was concealed by representations of the defendants that a final payment *was forthcoming (but which was never received)*. The Sixth Circuit initially noted that it was "questionable whether these acts constitute concealment at all, since they did not conceal from the plaintiff the means of discovering his cause of action." *Id.* at p. 93,274. Yet even assuming that such statements could be construed as acts of fraudulent concealment, the Sixth Circuit rejected the argument that such allegations exempted the plain-

6. Among the facts relied on by the Ninth Circuit in applying the objective test was that the plaintiff received conflicting stories from the management of the issuer and that he had been refused access to the company's books. *Id.* at 770-71. Similarly here, Summer's complaint alleges that L&L and its management denied him access to L&L's books and records and that they repeatedly assured him that annual reports and financial information were forthcoming (but which were never received). Pet. at 4.

tiff from exercising due diligence. *Id.* A plaintiff who sought avoidance of:

> "the important public policies behind statutes of limitations . . . 'vital to the welfare of society'. . . owe[d] the courts, the public and his adversaries a duty of diligence in discovering and filing his lawsuit."

*Id.* at p. 93,275.

Thus, notwithstanding the plaintiff's allegation that the statute was tolled because the defendant's statements about the forthcoming future payment lulled him into repose, other facts "as a matter of law . . . should have apprised a diligent plaintiff of his cause of action within the limitations period and . . . his inaction in the face of these facts does not warrant tolling the statute of limitations." *Id.* at p. 93,274. As a matter of law, the requisite diligence was nonexistent. *Id.* at p. 93,275.

Identically here, notwithstanding Summer's allegations that certain other defendants repeatedly represented that financial information was forthcoming (which he never received), Pet. at 4, all the other facts, such as denial of access to L&L's books and records and the failure to hold annual shareholders' meetings, demonstrate as a matter of law Summer's lack of due diligence. Indeed, the unfulfilled *repeated* promises that information about L&L was forthcoming would have caused any reasonable person to press his investigation forward with appropriate due diligence once the information was not received. Rather than lull Summer, it should have spurred him to action much sooner. The Fifth Circuit's conclusion to the contrary was reached by erroneously applying a subjective standard and deferring it as a question for the jury, although the facts as to what occurred or did not occur were never in dispute under Summer's own allegations.

As such, it conflicts with the objective standard of due diligence applied by the other circuits.[7]

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7. For the first time in this litigation, Summer suggests that his fraudulent concealment/due diligence allegations are impacted, in some unexplained fashion, by an undefined "fiduciary relationship"

*(footnote cont'd. on next page)*

## II.

## AY'S PETITION SHOULD BE GRANTED AND THIS CASE CONSOLIDATED WITH HERMAN & MACLEAN V. HUDDLESTON

AY previously noted the potential impact here of the grant of certiorari in *Herman & MacLean, supra*, Pet. at 16 n.17. However, prior to filing this Petition, AY was unable to obtain and review the petition in *Herman & MacLean*. A review of the *Herman & MacLean* petition indicates that the instant case not only presents the identical issue—whether conduct alleged to be a violation of the '33 Act for which an express remedy is provided may serve as a basis for an implied action under § 10(b) of the '34 Act—but along with *Herman & MacLean*, permits the fullest factual predicate for consideration of that issue and its ramifications.

Although alleging fraud in a public offering, the plaintiff in *Herman & MacLean* did not assert a claim under § 11 of the '33 Act and relied solely on implied claims based upon § 17(a) of the '33 Act and § 10(b) of the '34 Act. *Herman & MacLean* v. *Huddleston*, Dkt. 81-680, Petition for Certiorari dated October 8, 1981, at 3, 9 n.7. This case presents the corollary situation of a plaintiff, who alleging a fraud in a public offering of securities, simultaneously invoked express and implied claims under the '33 and '34 Acts, but whose express claims on those same facts under

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*(cont'd.)*
owed by "the defendants." Opp. Br. at 6. Whatever this reference is meant to imply as to the other defendants, it is well established that an accountant is not a fiduciary simply because he is engaged to perform, and does perform, the function of an independent auditor. *Franklin Supply Co.* v. *Tolman*, 454 F.2d 1059, 1065 (9th Cir. 1972); *Competitive Associates, Inc.* v. *Laventhol Krekstein Horwarth & Horwath*, 478 F. Supp. 1328 (S.D.N.Y. 1979); *Shofstall* v. *Allied Van Lines, Inc.*, 455 F. Supp. 351, 360 (N.D. Ill. 1978). Thus, while an independent auditor might be liable to his client for acting negligently or fraudulently, *Franklin Supply Co.* v. *Tolman, supra*, 454 F.2d at 1065, in ordinary professional engagements, an auditor simply is not a fiduciary to his client, let alone a third party such as a shareholder. GORMLEY, THE LAW OF ACCOUNTANTS AND AUDITORS (1981) ¶5.01[1] at p. 5-2 n.2; CAUSEY, DUTIES AND LIABILITIES OF PUBLIC ACCOUNTANTS (1979) at 72-73. Moreover, no court has ever found an independent auditor to be a fiduciary to a share holder under the facts presented here.

§§ 11 and 12(2) of the '33 Act were dismissed as time barred under § 13 of the '33 Act. Pet. at 4a-5a. The Court of Appeals nonetheless allowed the implied claims under § 17(a) of the '33 Act and § 10(b) of the '34 Act to escape the effects of the limitations provision provided by Congress in § 13. *Id.* at 5a-10a.

Finally, as noted in AY's Petition Pet. 16 n.17, even if this Court finds that a party may assert a claim for an implied remedy where an express remedy has been provided, the issue still remains whether the limitations period enacted by Congress to govern the express remedies with their congressionally mandated (and limited) tolling rule shall control over a more amorphous court created equitable rule based on a reference to state law. Pet. 14-17[8]

Thus, between this case and *Herman & MacLean v. Huddleston*, this Court has the opportunity to address the propriety of the avenues open to a plaintiff alleging fraud in connection with a public offering of securities (1) to disregard the express statutory

8. On April 30, 1982, the Eleventh Circuit decided *Gunter* v. *Hutcheson*, 674 F.2d 862 (11th Cir. 1982). That decision squarely conflicts with the decision of the panel in the case at Bar which failed to apply the congressionally created tolling rule in § 13 of the '33 Act to all of Summer's claims. In *Gunter*, the Eleventh Circuit held that the 1933 and 1934 Acts are construed "in pari materia as a single comprehensive regulatory scheme." *Id.* at 876. The Court went on to note:

> "Although . . . the 1933 and 1934 Acts do not overlap completely, and certain rights may be available under one Act which are not available under the other, . . . in this case the Gunters' claims under the 1933 and 1934 Acts are all based on the same fraud-misrepresentation theory. Consequently we conclude that permitting an action to go forward under the 1933 Act, which does not specifically provide for a private right of action, while holding that identical claims under the 1934 Act are barred by the defense of § 29(c), would create a dichotomy between the two Acts that was not intended by Congress and that would be counter to the express protection of innocent purchasers in § 29(c). Hence we hold that assuming the Gunters may bring an action under § 17(a) of the 1933 Act, . . . that action in this case is barred by the defense in § 29(c) of the 1934 Act." (Footnotes omitted.)

*Id* at 877.
Under the holding of *Gunter*, the limited equitable tolling rule of § 13 of the '33 Act would take precedence over the federal equitable tolling rule and the claims time barred. *See als* · Pet. 14-17.

scheme entirely by entirely disavowing any of the express claims provided or, alternatively, (2) to circumvent a statute of limitations dismissal concerning any express claims asserted by simultaneous assertion of implied claims based on the same conduct.

## CONCLUSION

It is respectfully submitted that this Court grant AY's petition and consolidate it with *Herman & MacLean*. Alternatively, this Court is requested to defer any decision on AY's Petition until such time as it renders its decision in *Herman & MacLean* since, as noted in AY's earlier Petition at 16 n. 17, a ruling by this Court that no recourse to implied remedies may be had when an express remedy is provided, would be dispositive in this case as well.

DATED: June 2, 1982
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